No. 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ARKANSAS-BEST FREIGHT SYSTEM, INC.
EAST TEXAS MOTOR FREIGHT LINES, INC.
GILLETTE MOTOR TRANSPORT, INC.
WESTERN TRUCK LINES, LTD.
and
REGULAR COMMON CARRIER CONFERENCE OF
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

ELVIN L. REDDISH, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Arkansas—Ft. Smith Division

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APPELLANTS' BRIEF

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas (R. 398) is reported at 188 F. Supp. 160. The decision of Division 1 of the Interstate Commerce Commission (R. 385) appears at 81 M.C.C. 35. By order dated December 16, 1959 (R.

396) the entire Commission denied reconsideration of the decision of Division 1.

JURISDICTION

The judgment of the district court (R. 411) was entered on October 19, 1960, and notice of appeal was filed in that court by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and the Regular Common Carrier Conference of the American Trucking Associations, Inc., (R. 418) on December 16, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101 (b) and is sustained by the following decisions: *Frozen Food Express, Inc.* v. *U. S.*, 351 U.S. 40 (1956); *American Trucking Associations, Inc., et al.* v. *Frisco Transportation*, 358 U.S. 133 (1958); and *American Trucking Associations, Inc., et al.* v. *U. S., et al.*, 364 U.S. 1 (1960). Probable jurisdiction was noted April 17, 1961, and this case was consolidated with Nos. 49 and 53 which are separate appeals from the same judgment by other parties.

STATUTE INVOLVED

The National Transportation Policy, 49 U.S.C., preceding § 1, and §§ 203(a)(15), 209(b), 216(b), 216(d), and 218(b) of the Interstate Commerce Act, 49 U.S.C. §§ 303 (a)(15), 309(b), 316(b), 316(d), and 318(b), are set forth verbatim in Appendix A attached hereto.

QUESTIONS PRESENTED

1. Whether under the 1957 Amendments to § 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the district court erred in holding that the Commission, in determining whether issuance of a permit under § 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, particularly when the evidence of record before the Commission will not support a finding that such lower rates result from lower costs due to inherent economies and advantages.

3. Whether the district court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

STATEMENT

E. L. Reddish, one of appellees, filed an application with the Interstate Commerce Commission under § 209 (b) of the Interstate Commerce Act, [49 U.S.C. 309(b)], seeking a permit as a contract carrier by motor vehicle in the transportation of canned goods for three shippers[1] from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 states and of materials and supplies used in the manufacture of canned goods from 30 of those states to the four named origin points (R. 23-26, 386-387). The application was opposed by a number of rail carriers and by several motor common carriers (R. 37-42).

Reddish will not dedicate equipment to the exclusive use of any particular shipper (R. 107-108), but will use his equipment to serve the three supporting shippers who schedule their loads in accordance with the availability

[1] Steel Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.

of his equipment (R. 107). That equipment consists of tractors and ordinary van semi-trailers (R. 53, 54, 72).

Reddish holds no permanent operating authority but performed transportation for one of the three shippers under temporary authority issued by the Commission. The circumstances of that transportation were well described by the Commission (81 M.C.C. at 37, R. 388-389), as follows:

> "Applicant holds no permanent motor carrier authority. On June 12, 1958, he had nine tractor-trailer units under long-term lease to Steele. Because of a strike of Steele's drivers, applicant obtained temporary authority to transport, under contract with Steele, certain of the involved commodities from and to numerous points which he here proposes to serve. The temporary authority is conditioned to expire upon final determination of this proceeding. Practically all of the outbound shipments were comprised of less-than-truckload shipments for delivery at several points en route, including points in different States. For these small shipments, applicant assessed a rate computed on the basis of his truckload rate, with no extra charge for stopping in transit."

Steele uses common carriers for the transportation of straight truckload shipments (R. 132) but has found that the only way to use common carriers for the movement of small orders is to ship them ltl (less-than-truckload) (R. 133). Ltl service is unsatisfactory because the freight rates are prohibitive to most points (R. 173). Steele desires small shipments to move at truckload rates (R. 173) because ltl rates in some instances are two and three times higher and would throw Steele's products out of the competitive market (R. 193).

Cain uses common carriers for truckload shipments (R. 217-218) and desires a service on ltl quantities at truckload rates (R. 217, 226). Common carrier ltl rates are prohibitive (R. 228). Keystone also uses common carriers (R. 241, 252, 254, 256) and does not ship less-

than-truckload quantities (R. 258). It consolidates its small orders to make up a truckload (R. 259).

On the basis of the foregoing and other evidence of record the Commission (R. 395) found and concluded:

> "* * * the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. * * * If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. * * *"

With respect to the service available from the protesting carriers the Commission found that by either direct or joint-line service they can provide transportation to substantially all of the points involved (R. 391);[2] that each operates a substantial amount of equipment suitable for the transportation of the commodities here involved (R. 391); that they have handled large and small shipments of the type of traffic involved (R. 392); and that they are willing to provide multiple pick-up and delivery service (R. 392).[3]

In its decision the Commission reviewed in some detail the testimony of the witnesses representing the three shippers with particular reference to the nature of their business (R. 389-391). Thereafter it concluded (R. 393):[4]

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[2] See R. 274-277, 289-291, 302-305, 309-311, 315-316, 322-325, 331, 335, 339-341, 349-350.

[3] See R. 278, 290, 303, 310, 311, 316, 354.

[4] See also, the finding of the Hearing Examiner (R. 370) that:

"* * * It [Steele] is obtaining satisfactory service from the existing motor common carriers on straight truckload ship-

"• • • Shippers require a motor carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stop-off-in-transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. • • •"

The Commission went on to consider the effect of denial of the application on Reddish and the three supporting shippers. It said (R. 394):

"• • • Applicant is a new entrant into the field of motor transportation, and we think it clear that a denial of this application could not be said to affect him adversely. Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over

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ments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stopoffs for delivery of a portion of the freight at one or two points en route to final destination. • • •"

regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

The district court reversed the decision of the Commission (R. 410). In so doing it said (R. 405):

"Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; * * *"

Speaking of the same subject at another point in its decision, the court said (R. 409):

"Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. * * *

"* * * Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. * * *"

Both of the above statements of the district court were necessarily made in light of the evidence summarized above. However, there is not one scintilla of evidence in the case regarding the operating costs of any carrier, neither Reddish nor any protestant, or regarding either contract or common carriers generally.

The court also held that the 1957 amendments to §§ 203 (a)(15) and 209(b) forbid consideration by the Commission of whether or not existing carrier service is adequate in determining whether approval of a contract carrier application would be consistent with the public interest and the National Transportation Policy (R. 406-408), and substituted its judgment for that of the Commission in holding that the shippers require a special service not available from the protesting carriers (R. 410).

SUMMARY OF ARGUMENT

In determining whether it is consistent with the public interest and the National Transportation Policy either to grant or to deny contract carrier rights, both to prevent shortages in transportation and to avoid creation of unnecessary service, the Commission must know whether present service is adequate. To require the Commission, as does the court below, to act without regard to the quantum of service presently available, is to require a decision in a factual vacuum.

The level of rates is not at issue in a proceeding for new contract carrier authority under § 209 of the Interstate Commerce Act. Other sections of the Act provide means of testing the reasonableness of rates, and shippers dissatisfied with present rates may not rely upon that dissatisfaction to support a grant of new authority. Moreover, when there is no evidence of record, statistical or otherwise, establishing that contract carriage may be sustained at a proffered lower rate level it is error to hold that such lower rate level reflects inherent economies

and efficiencies distinguishing the proposed service from the available service.

The service proposed is ordinary truck-load and less truck-load service in ordinary van-type trailers. Similar service is provided by protestant common carriers. Upon an examination of the facts and a carefully detailed analysis thereof, the Commission concluded that the service proposed at least in all reasonable aspects could be provided by existing carriers. For the court below upon the same record to conclude that the supporting shippers require a special service not provided by common carriers is, these appellants assert, to substitute its judgment for that of the Commission. For the Commission to discharge its heavy responsibilities imposed by Congress in the development and regulation of our national transportation system it must continue to have and to exercise a wide discretion as previously recognized by this Court.

ARGUMENT

I.

Adequacy Of Existing Service Must Be Considered By The Commission In Determining Whether A Proposed Contract Carrier Service Would Be Consistent With The Public Interest And The National Transportation Policy.

In reversing the decision of the Interstate Commerce Commission the court below places principal reliance upon the decision of the District Court in *J-T Transport Co., Inc.* v. *United States and Interstate Commerce Commission*, 185 F. Supp. 838 (W. D. Mo., 1960). Both courts erred in holding that the Commission, in considering an application for a contract carrier permit, may not consider whether existing motor carrier service is adequate to meet the reasonable transportation needs of the supporting shipper or shippers. Accordingly, both the case at bar

and the *J-T Transport* case which is before this Court in Nos. 17 and 18, October Term 1961, raise identical issues with respect to the interpretation to be given § 209(b) of the Interstate Commerce Act, as amended (49 U.S.C. 309(b)). The Regular Common Carrier Conference, one of the appellants herein, has argued these issues, *in extenso*, in its brief in the *J-T Transport* case, filed concurrently herewith in No. 18, October Term, 1961. In the interest of avoiding undue repetition, these appellants specifically adopt that argument which, for convenience, is set forth verbatim in Appendix B attached hereto.

II.

Lower Rates Proffered By Contract Carrier Applicant Not Relevant In Plea For Operating Rights

Rate Levels Not Properly at Issue in Section 209 Proceedings

The lower court, condemning the Commission's treatment of the effect of a denial of a permit upon applicant's supporting shippers, said (188 F. Supp. at 167, R. 409):

> "• • • Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. • • •"

At the outset we urge that rate levels are not properly at issue in a proceeding where new operating rights are sought. This has been the traditional and generally

approved policy of the Commission.[5] Speaking of the expressed attitude of the shippers in the case before it, the Commission said (81 M.C.C. at 42, R. 395):

> "• • • the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. • • •"

Reasonableness of a rate level is a subject not embraced within § 209, and relief from unreasonable common carrier rates may be sought under either § 204(c) or 216(d) of the Act. 49 U.S.C.A. §§ 304(c) and 316(d).

In *Omaha & C. B. Ry. Bridge Co. Com. Car Application*, 52 M.C.C. 207, 235 (1950), a protestant transit company in opposing a grant urged that the applicant, if successful, would later increase passenger rates to the public. The Commission, rejecting that view, said:

> "We have consistently refused to consider the issue of rates as pertinent in proceedings of this nature, since that is a matter for which other provisions of the act provide a remedy. • • •"

Pomprowitz Extension—Packing House Products, 51 M.C.C. 343 (1950), involves a contract carrier applicant that sought either a broadened interpretation of operating rights or an extension of authority. Denying the authority, and observing that the evidence adduced did not establish that the needs of supporting shippers cannot

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[5] *American Trucking Asso.* v. *United States*, 326 U.S. 77, 86 (1945); *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 91-92 (1957); *Railway Express Agency* v. *United States*, 153 F. Supp. 738, 741 (S.D. N.Y. 1957).

be met by existing carriers, the Commission concluded (p. 350):

> "• • • To the contrary, it strongly suggests the conclusion that their support of the application is based upon the element of rates rather than service and that, of course, is not a proper predicate for a finding that the proposed service would be consistent with the public interest and national transportation policy. • • •"

In *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695 (1948), a supporting shipper urged expanded contract rights for an applicant, advancing the high rates of common carriers as a reason therefor. Denying the authority, the Commission said (p. 709):

> "• • • If the rates of the authorized carriers are too high, section 216 of the Interstate Commerce Act provides an appropriate remedy. We conclude that this application should be denied."

The proper area for consideration of rate levels in operating authority cases was described by this Court in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957). There, distinguishing decisions, except one, where the contending parties were carriers of the same mode and operating in the same territory, the Court said:

> "• • • Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an 'inherent advantage' of the competing type of carrier and cannot be ignored by the Commission."

Two important facts distinguish *Schaffer* from the case at bar. First, the controversy involved motor versus rail service. Second, and of even greater significance, the "inherent advantage" in the *Schaffer* case was the ability

of one of the two types of carriers to operate more cheaply than the other. In the case at bar there is no evidence whatever to indicate that Reddish can operate more cheaply than existing carriers. Accordingly, there is no warrant for the conclusion of the district court that the low rate level maintained by Reddish must be considered by the Commission as an inherent advantage.

There Was No Evidence From Which Economies And Efficiencies Could Be Found

The lower court held, as detailed earlier herein, that the Commission may not disregard evidence of lower rates produced by economies and advantages in a proposed contract carrier operation. It said (188 F. Supp. 167, R. 409):

> "• • • Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance • • • the Commission may not disregard this evidence • • •"

Examination discloses that the record contains no evidence of economies and advantages productive of low contract carrier rates. The only cost or financial statement produced was a balance sheet of applicant dated March 31, 1958, some two and one-half months prior to the institution of operations by Reddish under temporary authority (R. 46, 58). All of applicant's income prior to June 13, 1958, was derived from the business of leasing vehicles and none from operations as a for-hire carrier (R. 71). Therefore, that evidence is not relevant to Reddish's operating costs as a carrier and there is no other evidence dealing with such costs. In the absence of any evidence supporting it the holding of the court below should be reversed. *State of New York* v. *U. S.*, 257 U.S. 591 (1922).

The decision of the court below necessarily implies a comparison of operating costs encountered or reasonably expected by Reddish with those encountered by protesting motor common carriers. Protestants entered no evidence

of their operating costs, nor did Reddish. Thus there are neither contract carrier costs of record nor common carrier costs of record and the court below, in finding as a fact that the lower rates proffered by Reddish resulted from economies of the contract carrier, made an assumption wholly unwarranted by the record.

Decision Below Invites Predatory Practices Violative Of Act

The rule of law stated by the district court in this case is in direct conflict with long-established Commission policy and forces the Commission to open the door to one of the most destructive practices known to for-hire carriers. Under the view of the district court, prospective motor carriers seeking to enter the field of regulated for-hire carriage, and carriers seeking expansion, would be allowed to indulge in destructive competitive practices in that the mere maintenance by them of low rate levels would, in and of itself, constitute justification for the issuance of new operating authority. Thereby, existing motor carriers would be utterly defenseless in trying to protect their economic health and the value of their operating rights. See *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748 (1953), aff'd. 121 F. Supp. 277 (1954). Moreover, such a view is in direct conflict with the mandate of the National Transportation Policy which requires the Commission to prohibit unfair and destructive competitive practices. The court's view would seriously curtail the broad range of discretion granted to the Commission by Congress and, as to contract carrier permits, would transform the Commission into a ministerial body for the purpose of issuing new rights. The rule laid down by the district court undermines the effectiveness of the Commission's power to promote sound and stable transportation by requiring the creation of new operating authority on the basis of proffered rates alone without any showing of an ability to operate profitably at such rates. Thereby it permits the institution of a new competitive service which may

well destroy itself, but, more importantly, may destroy the existing motor carriers and weaken the national transportation system.

The court below attempts to avoid this result by the following language (188 F. Supp. at 167, R. 409):

> "• • • Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded."

As pointed out earlier herein, there is no evidence in the record before the Commission of efficient operation by Reddish. The compensatory nature of the proffered rates and the degree of operating efficiency cannot be ascertained when no actual operating costs were presented to the Commission. The existing motor carriers should not be required to defend their service and their rates against excessive competition and predatory practices on the basis of pure speculation. Such a requirement is not conducive to the maintenance of a sound transportation system.

The policy of protecting existing carriers and carrier facilities urged by these appellants has, since 1920, been the policy of Congress, and recognized by this Court. With the enactment of the Transportation Act of 1920, 41 Stat. 474, Congress established a new policy. Speaking of that Act in *Dayton-Goose Creek R. Co.* v. *United States*, 263 U.S. 456, 478 (1924), this Court said:

> "• • • The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construc-

tion of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intra-state commerce, to secure a fair return upon the properties of the carriers engaged."

The philosophy expressed by this Court in *Dayton-Goose Creek* was expressed by it with respect to motor carriers in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944). After noting (p. 81) that the Transportation Act of 1920 marked a sharp change in Congressional regulation of transportation, the Court made this observation (p. 83):

"• • • The premises of motor carrier regulation posit some curtailment of free and unrestrained competition. The origins and legislative history of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit; and that when a (carrier) inflicts injury upon its rival, it may be the public which ultimately bears the loss.' Cf. *Texas & P. R. Co.* v. *Gulf C. & S.F. R. Co.,* 270 U.S. 266, 277, 70 L. ed 578, 583, 46 S Ct 263."

Entry into the field of regulated for-hire transportation, the establishment of new carrier service upon the basis of lower rates unsupported by cost figures is a destructive, predatory policy not countenanced by the Act and contrary to Congressional policy as interpreted by this Court.

III.

The Record Fails To Disclose A Distinct Need of Supporting Shippers Which Would Not Be Met By Protesting Motor Common Carriers

In concluding that the Commission had erred in denying the authority sought, the court below said (188 F. Supp. at 167, R. 410):

"Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. As the Court said in the *J-T Transport* case:

> "'. . . a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs"*, that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.'"

It must be kept clearly in mind that § 203(a)(15) is simply the definition of the term "contract carrier" which includes therein one who provides "transportation services designed to meet the distinct need of each individual customer." A similar provision is included in § 209(b) where the Commission is required to consider the nature of the service proposed. The Commission found that Reddish affirmatively met the definitional requirement of § 203 (a)(15) (R. 393). Thereafter, in applying § 209(b) it found that the distinct needs of the three shippers could be adequately met by existing carriers. In reaching its conclusion, rejected by the court below, the Commission said (81 M.C.C. at 41, R. 393):

> "The next factor, the nature of the proposed service, requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly

or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stop-off-in-transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted."

The foregoing quotation demonstrates that in arriving at its conclusion the Commission compared the services proposed by applicant with those rendered by protestants and common carriers generally. Moreover, the Examiner in his report (R. 365-384) summarized the facts. The Commission, referring to that report said, (81 M.C.C. at 37, R. 388):

"• • • • The examiner's statement of facts is correct in all material respects, and we adopt it as our own. The facts are repeated only insofar as is necessary for discussion of the issues."

Significant attention is paid by the Commission to the facts respecting protestants' evidence and services, in the following language (81 M.C.C. at 39-40, R. 391-392):

"A number of motor-carrier protestants presented evidence of their authorities and operations. These are discussed in detail in the examiner's report and need not be repeated here. By either direct or joint-line service motor protestants can provide service to substantially all the points involved herein. Each of the opposing motor carriers, except Nelson Brothers, is a common carrier, and each operates a substantial amount of equipment suitable for the transportation of the commodities here involved. Although shippers have knowledge of the availability of service from several protestants, none of the protestants have par-

> ticipated in the involved traffic. All have expressed an interest in participating in this traffic either as initial or connecting carriers on both inbound and outbound shipments. They have handled both large and small shipments of the type of traffic here involved and are willing to provide multiple pickup and delivery where authorized. • • •"

The foregoing recitation demonstrates the error of the court below in concluding that "no consideration was given to the special services which could not be supplied by a common carrier." (R. 410)

It is important to note that Reddish does not propose to dedicate his equipment to the exclusive use of any particular shipper, one test of specialization under the definition in § 203(a)(15). His trucks will collectively be used to transport the traffic of all three shippers and in addition will transport for any one commodities otherwise exempt from regulation by the Commission (R. 88, 107, 112). It thus becomes difficult to discover the "special services" to be rendered by Reddish and not rendered by common carriers.

Reliance by the court below for its conclusion that "special services" are not provided by protestants apparently stems from the Commission's statement (81 M.C.C. at 42, R. 394) that:

> "• • • In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

Use of the term "reasonable transportation needs" followed careful weighing of complaints which were found by the Commission to be of a "general nature, and [which] are not substantiated by reference to specific instances." (R. 394). Moreover, as to quality and flexibility of protestants' service the Commission said, "the supporting

shippers have failed to show that they have been unable to obtain reasonably adequate service upon request." (R. 394) In fact, with one exception the existing service "has been almost completely untried in recent years". (R. 394) In the same paragraph of its report the Commission considered evidence of service on inbound shipments, saying "As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation." (R. 394)

The only other type of shipment is in truckload movement, outbound. The Commission found that the shippers made no complaint on outbound truckload service, and that at least joint-line truckload service of existing carriers will be used in the future (R. 390, 391).

It is quite logical, then, these appellants believe, for the Commission, after reviewing the evidence, and commenting upon it, as just related, to conclude that present service is adequate for "reasonable transportation needs." This language is prudent and realistic and wisely admits the possibility that unusual or capricious demands of a shipper might not be met by the type and quantum of existing service available.

That a shipper's adamant position is not determinative of proper Commission action in licensing proceedings has been noted by this Court in *American Trucking Associations* v. *United States*, 364 U.S. 1, 18 (1960) where it said:

> "• • • And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. • • •"

Clearly, the judgment of the Commission as to the distinct transportation requirements of the supporting ship-

pers, i.e., their reasonable transportation needs, is supported by substantial evidence of record. Similarly, the finding by the Commission that existing carriers could meet those distinct needs—is supported by substantial evidence. Accordingly, it was error for the court below to susbtitute its judgment for that of the Commission with respect to these material questions of fact.

Finally, these appellants urge that in the area of law here embraced the regulatory agency possesses wide discretion. This Court has repeatedly observed that the Commission possesses a wide range of discretionary authority in determining whether the public interest warrants certification of any particular proposed service. *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88 (1957); *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515 (1946); *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236 (1945); *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60 (1945).

The principle expressed by the Court is not less applicable, we think, merely because the cases cited relate primarily to common carriers. To confine narrowly the Commission's discretionary authority in resolving transportation issues arising under concepts of the public interest and the National Transportation Policy, as does the court below, would be effectively to substitute the judgment of the court for that of the Commission.

CONCLUSION

These appellants respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

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September 1, 1961

APPENDIX A

NATIONAL TRANSPORTATION POLICY

"[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

DEFINITIONS

Section 203(a)(15) (49 U.S.C. 303(a)(15))—

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehi-

cles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLES.

Section 209(b) (49 U.S.C. 309(b))—

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of

issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions, or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Section 216(b) (49 U.S.C. 316(b))—

"(b) It shall be the duty of every common carrier of property by motor vehicle to promote safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner

and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

Section 216(d) (49 U.S.C.316(d))—

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever: or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

SCHEDULES OF CONTRACT CARRIERS BY MOTOR VEHICLE

Section 218(b) (49 U.S.C. 318(b))—

"(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle,

or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

APPENDIX B

ARGUMENT DEALING WITH CONSIDERATION OF ADEQUACY OF EXISTING SERVICE BY THE INTERSTATE COMMERCE COMMISSION IN DETERMINING WHETHER A CONTRACT CARRIER SERVICE WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY

Set forth below is a reproduction of that portion of the argument made by the Regular Common Carrier Conference, one of the appellants herein, in its brief in *U.S.A.C. Transport, Inc., Common Carrier Conference—Irregular Route, of the American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc.* v. *J-T Transport Company, Et Al.*, October Term, 1961, No. 18, filed concurrently herewith which deals with issues common to both the case at bar and the *J-T Transport* case.

ARGUMENT

A. Consideration of Adequacy of Existing Service Not Only Permissible, But Required

Public Interest Contemplates Consideration of Adequacy

Essentially, the instant controversy involves a dispute as to whether the Interstate Commerce Commission in denying a request for contract carrier authority has exceeded its discretionary powers as delineated by the legislative standard laid down by Congress for application in such matters. Stated more specifically, may the Commission within that standard [consistency with the public interest and the National Transportation Policy) consider the adequacy of existing motor carrier service. In resolving the issue, it is helpful at the

outset to recall the broad range of discretion recognized by this Court to be lodged in administrative agencies.

It is well settled that the term "public interest" standing alone is in itself sufficient as a legislative standard. *Avent* v. *United States*, 266 U.S. 127 (1924); *United States* v. *Chemical Foundation*, 272 U.S. 1 (1926). Although arising under §5 of the Interstate Commerce Act, the Court's decision in *New York Central S. Corp.* v. *United States*, 287 U.S. 12 (1932), contains a revealing discussion of the meaning of the term "public interest." There it stated that:

> "• • • The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but *has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, *the question is not essentially different* from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and *to the issue of certificates of public convenience and necessity.*" [287 U.S. 25] (Emphasis supplied)

It was also recognized that by use of the aforementioned standard:

> "• • • The question whether the acquisition of control in the case of competing carriers will aid in *preventing an injurious waste* and in securing more efficient transportation service *is thus committed to the judgment of the administrative agency upon the facts* developed in the particular case." [287 U.S. 26] (Emphasis supplied)

The term "public interest" not only is irrevocably associated with considerations of adequacy of service, but,

as well, the area of permissible inquiry by the administrative agency seeking to measure the "public interest" is recognized as broad.

Broad Interpretation Under Other Statutes

One of the landmark cases in this general field is *Federal Power Comm.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). There Congress had provided that certain natural gas rates regulated by the Federal Power Commission should be "just and reasonable", but no express formula was provided for reaching the required determination. It was held that the Commission was not bound to any formula or combination of formulae in order to comply with the legislative standard [320 U.S. 602]. It is the result reached, not the method employed which is controlling. This Court there held that, "• • • the product of expert judgment • • • carries a presumption of validity." [320 U.S. 602].

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the legislative standard laid down by Congress to guide the Federal Communications Commission in the exercise of its licensing power was the "public convenience, interest or necessity," certain specific criteria being set forth in § 307(b) of the Communications Act [47 U.S.C. 307(b)]. The standard of "public interest" was found not to be vague [319 U.S. 225-226] and despite the specific criteria wide discretion was recognized to have been placed in the administrative agency through the legislative standard adopted by Congress.

Even in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), wherein a decision of the F.C.C. was overturned, wide latitude was recognized in the hands of the administrative agency when applied within the sphere of its own expertise. There, where the agency sought to license one of two competitors on the ground that it was national policy to

encourage competition, the Court in rejecting the agency action nevertheless stated that the result reached would have been valid, "[h]ad the Commission clearly indicated that it relied *on its own evaluation of the needs of the industry* rather than upon what it determined a national policy * * *." [346 U.S. 94] (Emphasis supplied) It was found that competition might be allowed, whenever *the Commission* finds "that tangible benefit to the public would be derived from the authorization" [346 U.S. 89], but "* * * the Commission must at least warrant, as it were, that competition would serve some beneficial purposes such as maintaining good service and improving it." [346 U.S. 96-97].

Consideration Permissible Under Legislative Standard

It is clear from the foregoing that where broad legislative standards are laid down by Congress to guide an administrative agency in the exercise of its functions, the agency may consider and give weight to factors or elements reasonably embraced within that standard. What is appropriate may well vary from case to case. But so long as the factors or elements considered are consistent with the standard and with the purpose and policy of the act administered, and do not fall into areas outside the expertise of the agency, any material and relevant factor developed of record will not be found to be inappropriate. In short, the range of administrative discretion is broad. That of the Interstate Commerce Commission is no exception.

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), the Commission's action in granting a certificate of "public convenience and necessity"[1] to a rail

[1] With respect to the scope of administrative discretion, there is no difference in approach based upon whether a standard is laid down in terms of "public convenience and necessity" or "consistency with the public interest." Indeed, in *American Trucking Associations* v. *United States*, 355 U.S. 141, 149-150 (1957) it was

affiliate was under attack. There the Court said that:

> "• • • The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. Powell v. United States, 300 US 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 US 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. • • •" [326 U.S. 65]

Referring to the National Transportation Policy and the broad generalizations contained therein, the Court said:

> "• • • In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress." [326 U.S. 66]

It was further stated that the Commission:

> "• • • is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. • • •" [326 U.S. 72-73]

Consideration Required by National Transportation Policy

Moreover, in a concurrent decision, *American Trucking Asso.* v. *United States*, 326 U.S. 77 (1945), the interest of the public was specifically tied to consideration of the effect of the proposal upon other carriers. In finding that, "• • • the Commission should have admitted evidence of the flow of traffic by

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expressly recognized that where within the "public interest" under § 5 of the Act a railroad might obtain control of a motor carrier operation only if such operation could be used to benefit in the railroad operation, the policy thereby expressed would generally be applied as well in matters arising under § 207 of the Act where the legislative standard involved "public convenience and necessity." See also *American Trucking Assos.* v. *U. S., et al.*, 364 U.S. 1, 7 (1960).

truck • • • ", the Court stated that the problem of whether to grant a certificate to rail subsidiaries could be solved only after receipt of evidence as to the probable effect of the proposal on protesting motor carriers [326 U.S. 85, 86].

It is fair to conclude that while, on the one hand, there rests in the Commission wide latitude in the selection of factors or elements to which it may give weight, its administration of the Act, on the other hand, must always be accomplished with full regard to the National Transportation Policy. In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), the Court stated that:

> "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured • • •. [pages 87-88]
>
> • • • •
>
> "• • • since the findings • • • do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." (page 92)

See also *American Trucking Assos.* v. *United States, et al.*, 364 U.S. 1, 11 (1960); *Eastern-Central M. C. Assoc.* v. *United States*, 321 U.S. 194, 206 (1944); *American Trucking Assos* v. *United States*, 355 U.S. 141, 152 (1957).

The district court's decision, is thus framed by this situation: (a) On the one hand, the Commission is accorded great latitude in considering factors which shed light on the public's interest, here exercised by considering the adequacy of service offered by existing carriers; and (b) on the other hand, Congress actually *required* such consideration in view of its mandate that the Com-

mission, "• • • promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers • • •." Such service and such conditions are not promoted or fostered by licensing new carrier operations to perform a service which could be adequately rendered by existing carriers.

Recent Court Decisions

Several Court decisions issued since August 22, 1957, bear upon propriety of the Commission's grant or denial of contract carrier applications. The most illuminating is that of this Court in *American Trucking Assos.* v. *United States, et al.*, 364 U.S. 1 (1960). There the Commission's *grant* of a permit to a rail-controlled motor carrier was successfully attacked. It was found that the Commission's decision had failed to take into consideration general policy firmly intrenched in the law and implemented through a series of Commission decisions into a set of reasonably concrete standards [364 U.S. 7]. This Court once again commanded[2] that the Commission *must* take cognizance of the National Transportation Policy and apply the Act "as a whole." [364 U.S. 11]. The District Court in the instant case denied the Commission the power to do just that.

Moreover, in the *American Trucking* case, specific comment was made that the policy of the act does not allow issuance of a permit simply because a shipper wants a contract carrier service [364 U.S. 15]. These appellants submit that the supporting shipper here evidenced nothing stronger than such a desire, as distinguished from an actual need.

It seems clear that the *American Trucking* case negates the theory advanced by appellees and accepted by the

[2] Specific acknowledgment was made of the 1957 amendments, see 364 U.S. 13, footnote 9.

district court that the 1957 amendments severed § 209 (b) from any connection with criteria, tests or standards developed and applied in precedent cases arising prior thereto. This Court has reaffirmed the command to the Commission that it must take full cognizance of the National Transportation Policy and apply the Act "as a whole"—not confined exclusively to the narrow limits of the criteria added to § 209(b).

Similarly, in *Bass* v. *United States*, 163 F. Supp. 1, 3 (W. D. Va. 1958), aff'd 358 U.S. 333, rehearing denied 359 U.S. 956, a contract carrier applicant had been denied authority to perform a charter service which common carriers of passengers were already authorized to perform. There the court stated that:

> "• • • However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy, meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.
>
> "We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy."

It is clear from the above that the court relied on the validity of the adequacy doctrine in upholding the decision of the Commission.

A similar case arose in the United States District Court for the Eastern District of Virginia, Civil Action No. 2023, *Alexandria, Barcroft & Washington Transit Company and Washington, Virginia and Maryland Coach Company, et al.* v. *United States of America and Interstate Commerce Commission,* July 10, 1961. There, plaintiff common carriers contended that the Commission had erred in granting a contract carrier permit to perform charter passenger service because it did so in the mistaken belief that, as a matter of law, plaintiff common carriers could not provide the service required by the customer [The United States Government]. In upholding the plaintiff's view of the case, the District Court,[3] by decision dated July 10, 1961, observed as follows:

> "The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy in the case, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it."

B. Amendment To Section 209(b) Did Not Exclude Adequacy Of Existing Service

Section 209(b) is Clear And Unambiguous

The validity of the adequacy of existing service doctrine as applied in appropriate cases has never, to the knowledge of these appellants, been successfully challenged. It had become an accepted part of our transportation law long before August 22, 1957. Congress must be presumed to have known of this application of the standard of consistency with the public interest and the National Transportation Policy. The question then is whether the amendments to §§ 203(a)(15) or 209(b) taken singly or in combination so changed that law as to exclude appli-

[3] SOBELOFF, Chief Circuit Judge, HAYNESWORTH, Circuit Judge, and BRYAN, District Judge.

cation of the adequacy doctrine in contract carrier application cases.

The legislative standard set forth in § 209(b), as amended, is as follows:

> "• • • Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. • • •"

It is the belief of these appellants that the statutory provision set forth above is clear and unambiguous and "is the best expositor of itself."[4] Thereby, there can be no need to inquire into the legislative history of the amendment for it is well settled that legislative history may not be used to vary the plain meaning of an act.[5]

The term "public interest" and the National Transportation Policy are both well understood. Therefore, as

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[4] *Pennington* v. *Coxe*, 6 U.S. 33, 2 Cranch 33, 52 (1804).

[5] *United States* v. *Missouri P. R. Co.*, 278 U.S. 269, 278 (1929).

those terms are used in § 209(b) they are to be applied according to their plain and accepted meaning and resort may not properly be had to legislative history for the purpose of drawing inferences which are at odds with that plain meaning. See, *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Packard Motor C.* v. *National Labor Relations Board*, 339 U.S. 485 (1947); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); and *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953).[6]

The basic standard governing contract carrier applications set forth in § 209(b), as before, is whether the proposal will be "consistent with the public interest and the National Transportation Policy." The effect of the decision of the district court is literally to read out of § 209(b) the mandate of the National Transportation Policy even though that policy is an explicit part of the basic statutory standard. This constitutes a change in the law which only Congress has the power to accomplish.

In a number of cases this court has insisted that the Commission constantly approach regulation under the Act with scrupulous attention to the dictates of the Na-

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[6] And see *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945) where this Court said:

> "This argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. * * *"

tional Transportation Policy.[7] Yet, the district court held that in specifying five or six criteria to be considered in determining consistency with the public interest and the National Transportation Policy Congress precluded consideration of any other elements regardless of the mandate of the policy to administer and enforce the Act in light of its objectives. In substance, then, the district court held that the specific criteria set forth in § 209(b) constitute the entire scope of the public interest and the National Transportation Policy insofar as contract carrier applications are concerned. These appellants submit that so sweeping a change through the device of statutory construction may not properly be permitted. It is contrary to reason to assume that Congress would sharply curtail the scope of the National Transportation Policy in proceedings under § 209(b) while leaving it unchanged with respect to every other section of the Interstate Commerce Act. Accordingly, the District Court erred in holding that the Commission may not consider the adequacy of existing carrier service in determining whether or not a contract carrier application would be "consistent with the public interest and the National Transportation Policy."

Prescribed Criteria Require Consideraton Of Existing Service

At this juncture it must be pointed out that the district court in holding that the Commission may no longer consider adequacy of existing service necessarily assumed that in the case at bar the Commission held that merely because common carrier service was available no contract carrier service would be authorized. This is not an accurate appraisal of the Commission's decision. The Commission specifically found that the applicant's proposal constituted contract car-

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[7] See *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), and *American Trucking Assos.* v. *United States*, 364 U.S. 1 (1960).

riage (79 M.C.C. 706, R. 44-45). Then, in applying the public interest standard of § 209(b), including the specified criteria, the Commission found that the reasonable transportation needs of the shipper could be adequately met by the available service of existing common carriers and did not rquire the service proposed by the applicant. Thus, it is not the mere availability of common carrier service that warranted denial of the application, but rather it was the fact that the shipper's reasonable transportation requirements could be adequately met by such available service.

When the case is reviewed in proper prospective it becomes clear that adequacy of available service is necessarily included in at least two, and perhaps three of the criteria specified in § 209(b). Stated in simplified form the criteria are:

(1) The number of shippers to be served,
(2) The nature of the service proposed,
(3) The effect which granting the permit would have upon the service of protesting carriers,
(4) The effect which denying the permit would have (a) upon the applicant, and/or (b) upon the shipper, and
(5) The changing character of the shipper's requirements.

With respect to the second criterion "nature of service proposed," it is apparent that in order to consider the nature of the proposed service in relation to the public interest and the National Transportation Policy, consideration must be given to the shipper's transportation requirements and the nature of the available transportation service. To do otherwise would be to attempt to determine the public interest in a vacuum.

The third of the prescribed criteria is that the Commission shall consider the effect of granting a permit

upon protesting carriers. Plainly, because all of the criteria are set forth simply as considerations to be made by the Commission in determining consistency with the public interest and the National Transportation Policy, the evaluation by the Commission of the effect upon protesting carriers must be in terms of the public interest and the Policy. Therefore, such consideration must of necessity include an evaluation of the shipper's transportation requirements and the adequacy in light of those requirements of the available service of protesting carriers. To fail to so evaluate the effect upon protesting carriers of a grant of a permit would render this criterion substantially meaningless. Indeed, the very inclusion of this criterion in the 1957 amendments to § 209(b) is indicative of Congressional approval of the long line of Commission decisions holding that existing carriers are entitled to an opportunity to transport all traffic which they can handle adequately and efficiently before new operations will be authorized.

If the Commission, in summary fashion, granted all contract carrier applications without considering whether the service for which authority is sought is actually provided by or available from existing common carriers, as the district court would apparently have it do, the granting of each such permit would be an effective removal of actual or potential traffic from the common carrier system. Moreover, if existing common carrier service is eliminated from the Commission's considerations, the inevitable result can only be summary approval and issuance of such permits. At each industrial facility, at each commercial house, contract carriers could obtain new authority on the theory that the existence of adequate common carrier service does not negative the creation of a new and competitive contract carrier service. The result could only be an administration of the Interstate Commerce Act precisely contrary to the basic motives and

purposes underlying the passage of that Act and clearly stated in the National Transportation Policy. If the Commission is required to permit the persistent whittling away of common carrier traffic, actual or potential, through the granting of contract carrier permits regardless of the availability of common carriers to serve the same shippers, that agency could not possibly discharge its duty to foster sound economic conditions in transportation.

Neither under the Interstate Commerce Act as amended in 1935 (49 Stat. 543) nor under the 1957 amendments to the contract carrier provisions thereof, does there appear language warranting the pyramiding of new authority so as to jeopardize carriers already authorized by the Commission. The very passage of the law requiring government licensing before new for-hire operations in interstate or foreign commerce may be instituted is in itself persuasive that the economic health of presently certificated or permitted motor carriers is important to the nation. That idea finds specific expression in the National Transportation Policy.

Our fluid and dynamic economy constantly changes the location of factories and plants. Construction of a new plant here often means the closing there of a plant long served. New commodities, new products constantly replace the old and familiar. Potential traffic thus becomes as important as traffic presently enjoyed. Today's potential becomes tomorrow's reality. The considered traffic may be academically "potential" to U.S.A.C., but since its imbalance of traffic causes it to "deadhead" its vehicles empty westbound from the origin terminal Indianapolis (R. 116), the failure to be accorded an opportunity to transport the considered traffic is altogether present and real.

As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co.* v. *U. S.*, 120 F. Supp. 277 (1954).

Never has such a narrow and shortsighted view as that adopted by the court below been countenanced by the Commission or the courts. Indeed, the Act must be construed with due regard to its purpose.[8] Particular portions of an act should not be read *in vacuo*, but should be considered as a part of the whole with due regard to the overall purpose.[9]

Finally, the fourth criterion, i.e., the effect which denying a permit would have upon the shipper, also requires consideration by the Commission of the adequacy of service already available to the shipper. Thus, where the facts reveal the availability to a shipper of an existing motor carrier service which can adequately meet the shipper's reasonable requirements it is fair to conclude that a denial of a permit would not materially affect the shipper. On the other hand, if the facts revealed that an existing service could not meet the shipper's reasonable requirements the fair conclusion would be that a denial of a permit would materially and adversely affect the shipper. But, if the Commission is forbidden to evaluate the quality of service available to a shipper how can it make any meaningful determination of the effect upon that shipper of the denial of a contract carrier permit?

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[8] *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 492 (1939); *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

[9] *Koppers Conn. C. Co.* v. *Jas. W. B. Line*, 89 F. 2d 865 (1937).

Pursuant to § 209(b), as amended, and particularly its plain requirement that the grant or denial of a contract carrier permit rest upon the Commission's determination of consistency with the public interest and the National Transportation Policy, it is manifest that where a proposed contract carrier service is of a type or character consistent with common carriage, those carriers currently in a position to serve a shipper should be given an opporunity to do so. Where common carrier service is shown to be available and suited to the reasonable transportation needs of the shipper a prerequisite to approval of a contract carrier application is that the available service was tried and found wanting. Nor may the required actual or potential loss of traffic, as a test of the effect on protesting carriers, be so great in any single case as to cripple the existing service. For to so hold would be to allow such crippling effect, ignoring each individual case on the theory that no one blow is fatal. Yet, in the aggregate the result could only be a weakening of the national transportation system in direct contravention of the Congressional mandate as set forth in the National Transportation Policy.

National Transportation Policy Includes Adequacy

Moreover, in addition to the foregoing, the factor of adequacy of existing carrier service is also clearly found in the National Transportation Policy itself. This Congressional declaration demands that the Commission "• • • promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers • • •." Even prior to the adoption of the policy in its present form [10] the Commission equated the proposition stated above with adequacy of service. In *Podolsky*

[10] Prior to adoption of the National Transportation Policy in 1940 very similar language appeared in § 202(a) of the Act, 49 U.S.C. § 302(a), 49 Stat. 543.

Contract Carrier Application, 2 M.C.C. 653, 654 (1937), it was stated:

> "• • • In the consideration of contract-carrier applications we have frequently said that, *in order to foster sound economic conditions*[11] in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them." (Emphasis added)

Clearly, where it is established that existing carriers are in a position to provide a required service the quoted objectives of the Policy demand that they be afforded an opportunity to do so before a new service is created.

C. Legislative History Demonstrates That No Change In Statutory Standard was Intended Or Accomplished

While these appellants assert that disposition of this case can and should be made without reference to legislative history they likewise assert that an examination of that history will demonstrate that no change in the standard was intended or accomplished. This means that adequacy of existing service as a factor, embraced within the public interest and the National Transportation Policy, was not intended to be excluded by Congress in the 1957 amendments. The court below takes a contrary view (R. 167, 173).

Impetus for the 1957 amendments, was found in the decision of this Court in *United States* v. *Contract Steel Carriers*, 350 U.S. 409 (1956) and initiative for amending the statute was assumed by the Commission itself. In both its 69th and 70th Annual Reports, (1955 and 1956) the Commission recommended amendments dealing with

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[11] This language carries over to this day in the National Transportation Policy enacted *after* this and similar decisions, demonstrating the manner in which the adequacy doctrine is tied so closely to that Policy.

contract carriage. Insofar as is here pertinent, the Commission's original recommended amendments to §§ 203 (a)(15) and 209(b) were as follows:[12]

> "(1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:
>
> '(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.';
>
> • • • •
>
> "SEC. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' • • • "

The purpose of the Commission in recommending such changes is found in the testimony of former Chairman Clarke at hearings held on the bill introduced at the instance of the Commission. There, Mr. Clarke said:[13]

> "Under existing law, even though the initial grant of authority may have been based on a showing of need for individual specialized service, there is no assurance once a permit has been granted against a contract carrier actively competing with and supplanting common carriers by subsequently adding a large number of contracts with other shippers. In this connection the Supreme Court recently stated in *U. S.* v. *Contract Steel Carriers*, decided just a year

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[12] S. 1384, 85th Cong. 1st Ses.

[13] Hearings, Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, U.S. Senate, 85th Cong., 1st Ses., On S. 1384 And Other Bills, pp. 23-24.

ago, that a contract carrier is free to aggressively search for new business within the limits of its license. This decision has also cast considerable doubt on the correctness of the Commission's interpretation of the act as to specialization. Freedom to solicit customers without restriction as to specialized service would tend to obliterate the distinction which Congress intended to make between common and contract carriers. The amendments proposed in the bill would enable the Commission to give greater effect to Congressional purpose, first by amending the definition of contract carrier by motor vehicle to state clearly that the transportation services furnished by such carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers.

"Two, by specifically providing in section 209 (b) that the Commission, in granting contract carrier authority, may include terms, conditions, and limitations respecting the person or persons or the number or class for which a common carrier may perform transportation services, as may be necessary to assure that the business conducted by the permit holder is that of a contract carrier and within the scope of its permit.

"Third, by removing from the proviso in section 209(b) the prohibition which prevents the Commission from limiting the number of effective contracts which a contract carrier may have under its permit. The recommended amendment to section 212 is in the nature of a grandfather clause authorizing the Commission to issue a certificate in lieu of a permit without proof of convenience and necessity, where it finds that the operations of existing permit holders do not conform to the revised definition, are those of a common carrier and are otherwise lawful."

It is obvious from the recommended language of the Commission and from the testimony of its spokesman that it sought no change in the basic legislative standard to the effect that prior to issuance of a permit the proposed operation must be shown to be "consistent with the public interest and the National Transportation Policy."

The measure encountered vigorous opposition, particularly by the Contract Carrier Conference, an appellee here. It should be observed, however, that opposition of that Conference was not directed to the Commission's stated purpose, but against the inclusion of language recommended by the Commission and which the Conference later joined by the Commission deemed unnecessary to the accomplishment of the Commission's stated purpose. Further reference to the legislative history will establish the accuracy of this analysis.

In the hearings before the Senate Subcommittee on Surface Transportation on S. 1384, the Contract Carrier Conference was represented by its General Counsel, who also represents that Conference in the instant proceeding. Certain of the statements of the witness are particularly illuminating at this juncture.

At pages 299-300 of Hearings, Before A Subcommittee of The Committee on Interstate and Foreign Commerce, U. S. Senate, on S. 1384, the Contract Carrier Conference General Counsel said:

> "• • • Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission [dealing with limitations in contract carrier permits and grandfather provisions], we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b), the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.
>
> *"We do not suggest any change in that standard.* The only thing we have suggested in that connection

is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case*—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. * * *" (Emphasis added)

At page 303 of Hearings, supra, the General Counsel said:

"S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common carriers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing common carriers, to prove that such carriers were unable to perform a given service."

The foregoing makes clear that the Contract Carrier Conference sought no change in the standard applicable to contract carrier applications. The witness for the Conference called attention to the fact that under the then-existing standard, the Commission had always considered

the available common carrier service and urged only that *in addition* to such consideration the Commission should also be required to consider the effect of denial upon the applicant.

The Conference in that testimony objected to the more restrictive language proposed for inclusion in the definition of contract carriage and to the strict limitation that a permit should be issued only if existing common carriers were shown to be unable or unwilling to provide the service regardless of the public interest. The Commission concurred as will now be shown.

With respect to the described objectionable language proposed for amending § 209(b), former Chairman Clarke testified at pages 21-22 of Hearings, supra, as follows:

> "• • • As drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission, upon further consideration, has voted to withdraw its recommendation to amend Section 209 (b) in this respect • • •"

And with respect to the similar language contained in the recommended amendment to § 203(a)(15), Chairman Clarke wrote the Subcommittee under date of May 21, 1957, as follows:[14]

> "You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration, the Commission has unanimously voted also to recommend that the words 'and not provided by

[14] Hearings, pp. 43-44, supra.

> common carriers' be deleted from line 6 of page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized services."

The position of the Interstate Commerce Commission in the court below and before this Court is consistent with that taken by it before the Senate Committee. On the other hand, the Contract Carrier Conference in the court below, and in its motion to affirm herein, takes the position that by deleting the language referred to, the Congress substantially changed and limited the nature of Commission consideration of a contract carrier application.

Appellants urge that deletion of the language found objectionable by the contract carriers had only the effect of maintaining in *status quo* the burden of contract carrier applicants and left the broad scope of the Commission's consideration in such cases precisely the same as it was previously. We respectfully urge that for the Contract Carrier Conference now to take a position that the considerations to be weighed by the Commission in determining consistency "with the public interest and the National Transportation Policy" are limited or restricted is a reversal of the position taken before the Senate Committee and is not warranted by the legislative history.

If more is needed to establish Congressional intent a reference to the Senate Committee report [15] accompanying S. 1384 is illuminating. Concluding the main body of its report the Committee said:

> "Your committee is of the opinion that the public interest in a sound transportation system, and par-

[15] S. Rep. No. 703., 85th Cong., 1st Ses., p. 7.

ticularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

The background of the 1957 amendments considered, we respectfully submit that (a) there was no change in the basic standard governing contract carrier applications, (b) there was no intention whatever to curtail the discretion of the Commission in applying that standard, and (c) at most the intention was to insure consideration in all cases of the matters specified in the amendments.